

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA**

BECKLEY DIVISION

HOWARD BRYAN HARMON, JR.,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

)
)
)
)
)
)
)
)
)
)
)

Civil Action No. 5:00-1072

ORDER

Plaintiff filed his Complaint in this matter on November 16, 2000, alleging Defendant's liability under the Federal Tort Claims Act [FTCA], 28 U.S.C. § 1346(b)(1) and 28 U.S.C. § 2671, *et seq.*, for the negligent acts and omissions of persons responsible for providing medical treatment of his back condition. (Document No. 1.) During the course of the proceedings, Plaintiff filed two Motions for appointment of counsel. (Document Nos. 3 and 22.) He also filed a Motion for a Court Appointed Expert Witness. (Document No. 60.) The Court denied Plaintiff's Motions for Appointment of Counsel (Document Nos. 15 and 23.), but, as it appeared that the case was likely to go to trial, the Court appointed Scott P. Mason of the law firm Spilman, Thomas & Battle to represent Plaintiff pursuant to 28 U.S.C. § 1915(e)(1)¹ by Order entered on January 26, 2004. (Document No. 66.)² The Court stated in doing so that "[t]hough the Court finds that the case is not

¹ 28 U.S.C. § 1915(e)(1), enacted as part of the Prison Litigation Reform Act of 1995 [PLRA], states that "[t]he court may request an attorney to represent any person unable to afford counsel."

² The Court contacted Mr. Mason, a young lawyer expressing an interest in obtaining trial experience, and asked if he would be interested in representing Plaintiff in this case. Mr. Mason contacted Plaintiff and, having had an opportunity to discuss the case with Plaintiff, decided to accept the Court's assignment.

particularly complex, factually or legally, and that Plaintiff has demonstrated that he knows the applicable law and has been quite capable of presenting the salient facts on the background of the applicable law, the Court nevertheless believes that Plaintiff will likely be hampered by the circumstances of his incarceration and lack of experience in investigating crucial facts and preparing and presenting his case through pre-trial proceedings and trial. Under these circumstances, the Court finds that exceptional circumstances exist which warrant the appointment of counsel.” By Order entered on March 16, 2004, the Court denied Plaintiff’s Motion for a Court Appointed Expert Witness as moot because Plaintiff, represented by Mr. Mason, had employed and obtained the opinion of Dr. Andrew Landis, a board certified orthopaedic surgeon. (Document No. 69.) The case was tried to the Court on March 17 and 18, 2004. Plaintiff was unable to attend trial in person because he was incarcerated at the time at the Coffeewood Correctional Center in Mitchells, Virginia. The staff at the Coffeewood Correctional Center were very accommodating and permitted Plaintiff to attend trial and he testified telephonically.

On March 31, 2004, the Court filed Findings of Fact and Conclusions of Law and a Judgment Order finding that Defendant’s actions and omissions in transporting Plaintiff from FCI Beckley, West Virginia, to USP Terre Haute, Indiana, on August 11, 1999, without first examining him and providing him with medication to relieve his chronic back pain constituted negligence which proximately caused Plaintiff to have an acute flare up of back pain on the trip and awarding Plaintiff \$2,500 for the pain and suffering which he endured as a consequence of Defendant’s negligence. (Document Nos. 73 and 74.)

On April 30, 2004, Plaintiff filed an Application for Fees and Expenses of Plaintiff’s Counsel

and Expert Witness pursuant to 28 U.S.C. § 2412(d)(1)(B).³ (Document No. 75.) Plaintiff's attorney, asserting that Plaintiff substantially prevailed and "[t]he position of the United States in defending this action was not substantially justified", requests payment of fees in the amount of \$10,406.25 and expenses in the amount of \$4,845.82 which includes \$345.82 for mileage (\$236.62), photocopies (\$31.50), fax charges (\$47.00), meals (\$19.47), parking/toll charges (\$5.00) and postage (\$6.23) and

³ 28 U.S.C. § 2412(d)(1)(A) and (B), a part of the Equal Access to Justice Act [EAJA], provide as follows:

- (A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.
- (B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

"Fees and other expenses" is defined at §2412(d)(2)(A) as including "the reasonable expenses of expert witnesses . . . (the amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.)"

\$4,500 for payment of Plaintiff's expert witness, Dr. Landis, for a total of \$15,252.07. On May 7, 2004, Defendant filed a Response to Plaintiff's Application stating that Plaintiff's counsel is not entitled to an award of attorney's fees and expenses. Defendant states that under 28 U.S.C. § 2412(a)(1)⁴, the Court can award "costs" as set forth in 28 U.S.C. § 1920⁵ which does not include attorney's fees and 28 U.S.C. § 2412(d)(1)(A) permits an award of fees and expenses but excludes "cases sounding in tort". Defendant states that "[i]n tort cases including actions brought under the FTCA, the traditional 'American Rule' requires each party to bear their own attorney fees. Indeed, Congress has explicitly linked attorney fees to the judgment recovered in 28 U.S.C. § 2678. Pursuant

⁴ 28 U.S.C. § 2412(a)(1) provides as follows:

Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount to be established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

⁵ 28 U.S.C. § 1920 provides as follows respecting taxation of costs:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees expenses, and costs of special interpretation services under section 1828 of this title.

to that statute an attorney may not receive no more [sic] than 25 percent of any judgment rendered in an FTCA case.” (Citations omitted.)⁶ Defendant further states that Plaintiff is not entitled to recover the cost of his expert witness, Dr. Landis, because Dr. Landis was privately retained by Plaintiff’s attorney and was not a “court appointed expert” eligible for payment under 28 U.S.C. § 1920. Finally, it appears that Defendant claims that Plaintiff is not entitled to the costs which his attorney incurred incidentally in representing him through trial and claims that those costs should be paid from the amount which Plaintiff was awarded. On January 24, 2005, Defendant delivered a check in the amount of \$2,500 to the Clerk pursuant to Rule 6.02 of the Court’s Local Rules of Practice and Procedure and requested that it be deposited in an interest bearing account.⁷ (Document No. 79.) The Court ordered that the check be deposited. (Document No. 80.)

ANALYSIS

Rule 54(d) of the Federal Rules of Civil Procedure states respecting taxation of costs against the United States as follows:

⁶ 28 U.S.C. § 2678 states as follows:

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 percentum of any judgment rendered pursuant to section 1346(b) of this title . . . , or in excess of 20 percentum of any award, compromise, or settlement made pursuant to section 2672 of this title.

⁷ Local Rule of General Practice and Procedure 6.02 provides as follows:

The court may authorize the commencement, prosecution or defense of any civil or criminal action or proceeding, or any appeal without prepayment of fees and costs or security, by a person who makes an affidavit that he or she is unable to pay costs or give security as provided in 28 U.S.C. 1915. In all cases initiated without payment of fees and costs, the affiant shall stipulate in his or her affidavit that any recovery in the action shall be paid to the clerk, who shall pay therefrom any remaining unpaid costs taxed against the plaintiff and remit the balance to the plaintiff or to his or her attorney.

Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law.

Thus, it is recognized in this Rule that under the sovereign immunity doctrine, the United States must consent by way of some statutory enactment before it may be required to pay fees and costs. See generally O'Brien v. Moore, 395 F.3d 499 (4th Cir. 2005)(considering whether Congress waived the United States' sovereign immunity against an award of attorneys' fees in *habeas* actions through enactment of the EAJA and concluding that it did not.). The Court will therefore look to the statutory enactments noted above to determine what if any express and specific authorization exists for awarding attorney's fees and costs and expenses as requested in this case.

1. Attorney's Fees.

The Court notes preliminarily that while there is no constitutional right to counsel in civil cases, the Court nevertheless may "request" that an attorney represent an indigent civil litigant under certain circumstances pursuant to 28 U.S.C. § 1915(e)(1). Mallard v. United States District Court, 490 U.S. 296, 109 S.Ct. 1814, 104 L.Ed.2d 1814 (1989)(28 U.S.C. § 1915(e)(1) authorizes District Courts to request that attorneys represent indigent litigants in civil cases and does not permit Courts to require such representation.); Gordon v. Leeke, 574 F.2d 1147, 1153 (4th Cir. 1978), cert. denied, 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978)("If it is apparent to the district court that a pro se litigant has a colorable claim but lacks the capacity to present it, the court should appoint counsel to assist him.") See also Garrett v. Elko, 120 F.3d 261, 1997 WL 457667 (4th Cir. (Va.))(unpublished *per curiam* decision remanding Plaintiff's § 1983 action alleging deliberate indifference to his serious medical needs in violation of the Eighth Amendment with instructions to allow him to amend

his complaint and to appoint counsel to represent him.) Finding that Plaintiff's claims appeared to be meritorious, that expert testimony was necessary to prove them and that Plaintiff was unable adequately to develop and present them because he was then incarcerated in the Coffeewood Correctional Center in Virginia and unable to attend trial, the undersigned requested that Mr. Mason represent Plaintiff, and Mr. Mason agreed to do so. The Court then appointed Mr. Mason.

The Court finds that the FTCA contains no express and specific authorization for awarding attorney's fees to a prevailing party in addition to the amount of the judgment. Stive v. United States, 366 F.3d 520, 523 - 524 (7th Cir. 2004); Tri-State Hospital Supply Corp. v. United States, 341 F.3d 571, 577 (D.C. Cir. 2003); Anderson v. United States, 127 F.3d 1190, 1191 - 92 (9th Cir. 1997), cert. denied, 523 U.S. 1072, 118 S.Ct. 1512, 140 L.Ed.2d 666 (1998); Campbell v. United States, 835 F.2d 193, 196 (9th Cir. 1987); Joe v. United States, 772 F.2d 1535, 1537 (11th Cir 1985). 28 U.S.C. § 2678 provides that the amount an attorney may charge a client in a FTCA case is limited to 25 percent of the Court's judgment. Thus, under this provision Mr. Mason is entitled to payment from the \$2,500 currently in the Clerk's account in the amount of \$625.

The Court finds that the EAJA contains two separate and distinct provisions allowing for the award of attorney's fees to a prevailing party. Under 28 U.S.C. § 2412(d)(1)(A), the Court is required to award attorney's fees in any civil case except those "sounding in tort" unless the position of the United States was substantially justified or special circumstances make an award of attorney's fees unjust. This provision is obviously inapplicable in this FTCA case because it sounds in tort. 28 U.S.C. § 2412(b), the second provision, is permissive allowing that the Court may award reasonable attorney's fees and expenses against the United States if any other party would be liable under

common law or a statute.⁸ It contains no exception for “cases sounding in tort.” Nevertheless, the Court finds no basis in common law or statute for an award of fees and expenses in this case. Rather, parties in cases of this nature are expected to pay their own attorneys’ fees and their attorneys’ expenses.⁹

2. Costs and Expenses.

a. Expert Witness Fees.

Witness fees are recoverable in this case under 28 U.S.C. § 1920(3) but only to the extent provided by 28 U.S.C. § 1821(b).¹⁰ See Crawford Fitting Co., v. J.T. Gibbons, Inc., 482 U.S. 437, 445, 107 S.Ct. 2494, 2499, 96 L.Ed.2d 385 (1987); Gaddis v. United States, 381 F.3d 444, 450 - 451 (5th Cir. 2004); Hull v. United States, 978 F.2d 570, 572 - 573 (10th Cir 1992). When an expert

⁸ 28 U.S.C. § 2412(b) states as follows:

Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

⁹ Mr. Mason states in his Affidavit attached to his Motion that “I agreed to represent Mr. Harmon on a pro-bono basis.” The Court appreciates very much Mr. Mason’s enthusiasm and his firm’s support. Mr. Mason represented Plaintiff vigorously and effectively at trial. Unfortunately, though many enactments authorize awards of fees to counsel representing *pro bono publico*, an award of fees is not available in the context of this case.

¹⁰ 28 U.S.C. § 1821(b) provides as follows:

A witness shall be paid an attendance fee of \$40 per day for each day’s attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

witness is appointed by the Court, however, Courts may tax the expert's fees in excess of the limit set under 28 U.S.C. § 1920(6). Crawford Fitting, 482 U.S. at 442, 107 S.Ct. at 2497.¹¹

Plaintiff moved for appointment of an expert witness in this case (Document No. 60.), and his doing so in combination with his requests for appointment of counsel, the appearance that his claim had merit, the materiality of expert testimony in this case and Plaintiff's inability to attend trial brought the Court to ask Mr. Mason to represent Plaintiff. Mr. Mason promptly employed Dr. Landis, and he and Dr. Landis worked diligently to learn the case. Informed of these circumstances, the Court denied Plaintiff's Motion for a Court Appointed Expert Witness as moot. Had the Court proceeded with the employment of an expert witness, the Court would have contacted Dr. Landis or another qualified physician and asked if he or she would accept the Court's appointment. Apparently the Court could then have taxed the expert's fees to the United States whether the Plaintiff prevailed or not. In any event, these are not the circumstances in this case. Dr. Landis was not Court appointed. For these reasons, regrettably the Court must find that Plaintiff is not entitled to an award of fees in the amount which he requested but is entitled to an award of witness fees in the amount of \$40 under 28 U.S.C. §§ 1920(3) and 1821(b) for Dr. Landis' attendance at trial.¹²

¹¹ Federal Rule of Evidence 706(b) also provides for compensation of Court appointed expert witnesses as follows:

Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

¹² Counsel for the United States, Assistant United States Attorney Michael Keller, indicated at a hearing that his office occasionally employs Dr. Landis to give his expert opinion.

b. Other Expenses.

Whether the expenses which Mr. Mason incurred in representing Plaintiff are recoverable likewise depends upon whether, reading 28 U.S.C. §§ 2412 and 1920, there has been a waiver of sovereign immunity with respect to them. If the categories of costs claimed “fall outside the scope of § 1920, federal law mandates that the United States may not be held accountable because it retains sovereign immunity as to fees and expenses for claims sounding in tort.” Eppling v. United States, 958 F.Supp. 312, 317 (W.D. Ky. 1997). 28 U.S.C. § 2412(a)(1) provides that “[e]xcept as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States . . .” At least one Court has found that the sort of expenses which an attorney would ordinarily charge to a client may be taxed in an FTCA wrongful death case under 28 U.S.C. § 2412(b)(“Unless expressly prohibited by statute, a court may award reasonable . . . expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States . . .”) See Snow v. United States, 867 F.2d 613, *5 - 6, 1989 WL 4131 (9th Cir. (Nev.)), citing Int’l Woodworkers of America v. Donovan, 792 F.2d 762, 767 (9th Cir. 1985). The Court notes, however, that 28 U.S.C. § 2412(d)(1)(A) provides that the prevailing party may not recover fees and expenses in cases sounding in tort. The Court does not find any indication that Congress intended that attorney’s fees not be taxed but attorney’s expenses be allowed in cases of this nature. The Court does not accept the reasoning of the Court in Snow and further finds that the costs which Plaintiff is requesting incidental to Mr. Mason’s representation of him are not recoverable under § 1920. It does not appear, however, that Mr. Mason is prohibited from recovering his expenses from the

amount of the award in addition to his statutory fee entitlement (\$625) discussed above.

Accordingly, it is hereby **ORDERED** that Plaintiff's Application for Fees and Expenses of Plaintiff's Counsel and Expert Witness pursuant to 28 U.S.C. § 2412(d)(1)(B) (Document No. 75.) is **GRANTED in part** and **DENIED in part**. Plaintiff is entitled to recover and Defendant shall pay to Plaintiff the expense of Dr. Landis' attendance at the trial of his case as prescribed under 28 U.S.C. § 1821(b) to be \$40. Plaintiff's Application is denied insofar as Plaintiff seeks payment of attorney's fees and expenses.

The Clerk of this Court is directed to deduct the costs to Plaintiff for these proceedings including the \$150 filing fee from the amount currently being held in an account and issue and send a check made payable to Mr. Mason for the remainder in order that Mr. Mason can deduct amounts owing him for fees and expenses as is consistent with this ruling and send the balance to Plaintiff. The Clerk is further directed to send a copy of this Order to counsel of record.

ENTER: March 28, 2005.

R. Clarke VanDervort
United States Magistrate Judge

Counsel for Plaintiff:

Scott P. Mason, Esquire
SPILMAN, THOMAS & BATTLE
Post Office Box 273
Charleston, West Virginia 25321-0273
(304) 340-3800

Counsel for Defendant:

Michael L. Keller, Esquire
UNITED STATES ATTORNEY'S OFFICE
Post Office Box 1713
Charleston, West Virginia 25326-1713
(304) 345-2200